Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....71 - 455

GORDON F. RAGLAND and JAMES A. WRIGHT, JR.,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Tennessee

JAMES S. PATRICK, JR.
202 Public Square
Nashville, Tennessee 37201
Attorney for Petitioners

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

INDEX

Page

Opinions Below 1

Jurisdiction 2

Question Presented 2

Constitutional Provisions Involved 5

Statement of the Facts 5

Reasons for Granting the Writ 10

Conclusion 14

Appendix A-1

A. Constitution provisions A-1

B. Opinion of Criminal Court of Appeals, State of Tennessee, filed December 29, 1970 ..... A-2

C. Opinion on petition to rehear A-34

D. Stay Order on behalf of Gordon F. Ragland and James A. Wright, Jr. A-35

Table of Cases

Barbee v. Warden, 331 Fed. 2d 842 (4th Cir. 1964) ... 12

Brady v. Maryland, 373 U.S. 83, 1963 11

Bruton v. U.S., 391 U.S. 123, 1968 .....3, 7, 8

Bumper v. State of North Carolina, 391 U.S. 543, 1968 13

Giles v. Maryland, 386 U.S. 66, 1967 11

Judd v. U.S., 190 Fed. 2d 649 13

Miranda v. U.S., 384 U.S. 436, 1966 7

Roberts v. Russell, 392 U.S. 293, 1968 7

Roviaro v. U.S., 353 U.S. 553, 1967 11

U.S. v. Barton, DC Mass. 1967, 287 F.Supp. 758 13

U.S. v. Wallace, 160 Fed. Supp. 859 13

Wren v. U.S., C.A.10th, 1965, 352 Fed. 2d 617 13

Statutes Cited

Constitution of the United States, Amendment IV ... 4

Constitution of the United States, Amendment XIV, Section 1 ..... 2, 4

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To the Supreme Court of Tennessee

OPINIONS BELOW

Petitioner Gordon F. Ragland's conviction for the offense of Burglary Third Degree was revised and affirmed by the Court of Criminal Appeals for the State of Tennessee in an unreported opinion filed December 29, 1970 (Appendix B).

Petitioner James A. Wright, Jr.'s conviction for the offense of Receiving and Concealing as revised and affirmed by the Court of Criminal Appeals for the State of Tennessee in the same unreported opinion filed December 29, 1970 (Appendix B).

JURISDICTION

The original order affirming both petitioners' convictions was entered on December 29, 1970 (Appendix B). A petition for rehearing was seasonably filed and denied on January 25, 1971 (Appendix C). A Petition for a Writ of Certiorari was filed in the Supreme Court of Tennessee on March 10, 1971 and was denied on May 3, 1971. On May 5, 1971, an order was put down allowing the petitioners a stay of execution of their respective sentences while a petition for Writ of Certiorari was filed in the United States Supreme Court. On July 28, 1971, a petition was filed in the United States Supreme Court on behalf of petitioners by Counsel for an extension of time which was granted and petitioners were granted until September 30, 1971 to file a petition for Writ of Certiorari. The jurisdiction of this Court is invoked under 28 USC, Section 1257 (3).

QUESTIONS PRESENTED

Were the petitioners denied "Due process of law" and "equal protection of the laws" as a result of the decisions of the trial court.

I. Should the petitioners have been afforded separate trials as moved for in the trial court, where the conflict of interest between the parties was so great as to deny the petitioners a fair and impartial trial at the hands of the jury.

II. As the conflict of interest was magnified and became more evident as the trial progressed, should the motions of a mistrial and or severence have been granted to protect the petitioners rights under the Fourteenth Amendment to the Constitution of the United States.

III. Should the motions for a mistrial have been granted when co-defendant Dean Smith in a joint trial, on a plea of "not guilty", suddenly was called as a surprise witness for the State of Tennessee after both the Attorney General for the State of Tennessee and counsel for the defendant Smith had assured counsel for the instant petitioners and the Court that no "agreement" had been reached and "no deals" made for defendant Smith's testimony (pp. 269-283 BE). Petitioners feel that this surprise "witness" abridged their rights under both the "due process clause" and the "equal protection clause" of the Fourteenth Amendment.

IV. Were the petitioners denied "due process" and "equal protection" when evidence was presented against petitioner James A. Wight, Jr., that he had a prior conviction of the same offense for which he was being tried, said offense has since been reversed and dismissed by the Criminal Court of Appeals for the State of Tennessee as this testimony was highly prejudicial to the jury and effected both petitioners as there were no other convicted felons on trial.

V. Were the petitioners denied "due process" and "equal protection" where the confessions of two co-defendants were allowed in evidence in a joint trial in violation of **Bruton v. U.S.** (391 US 123, 1968). Perhaps the co-defendants would not have testified and the conflict of interest would have not been developed further. At the point of introduction Bruton was violated and a mistrial should have been granted.

VI. Were the petitioners denied "due process" and "equal protection" where counsel for one co-defendant found it necessary to bring out evidence of another trial involving petitioner James A. Wright, Jr., said case eventually being dismissed by the Court of Appeals of the State of Tennessee, a mistrial was moved for and denied.

Evidence was highly prejudicial to the trial jury and probably helped bring about the conviction.

VII. Were the "due process" and "equal protection" clauses of the Fourteenth Amendment violated by the conflict of interest which was obvious when Counsel for the defendant Smith even went as to note his exception to the Court's ruling in favor of petitioner Gordon F. Ragland upon a motion to suppress evidence seized in an illegal search (p. 242 BE). Of course, this was in the absence of the jury but it just shows the attitude of counsel in a joint trial. There was no cooperation between counsel, only animosity.

VIII. Were the "due process" and "equal protection" clauses of the Fourteenth Amendment violated when the District Attorney made prejudicial remarks in his opening argument by calling the defendants a strange association between "two thieves and three policemen" (pp. 530, 531, 532 BE). Had they not been tried together there would have been no reason for such a remark. This remark assumed guilt of the defendants and the two petitioners before this honorable court.

IX. Were the petitioners denied "due process" through an inability to properly prepare their defense when they were totally and legally surprised by the testimony of co-defendant Dean G. Smith as a State's witness at a point in the trial when circumstantial evidence had been admitted without objection based on the concept that the co-defendant Dean G. Smith would stand on his plea of not guilty and repudiate his confession which had been erroneously admitted by the Court prior to "anyone" knowing that he would take the stand.

X. Did the decision of the trial court as to the legality of a search and seizure violate the Fourth Amendment of the Constitution of the United States and therefore the articles seized should have been excluded as evidence.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of the Constitution of the United States are set forth in Appendix A.

STATEMENT OF FACTS

Petitioners, Gordon F. Ragland and James A. Wright, Jr., were arrested on or about the 27th day of January, 1967. Gordon F. Ragland was charged with burglary third degree and James A. Wright, Jr. was charged with receiving and concealing stolen property over the value of One Hundred ($100.00) Dollars. The defendants with other co-defendants were indicted on the 4th day of April, 1967 by the Davidson County Grand Jury. The petitioners were tried with their co-defendants, on the 16th day of April, 1968, in the Criminal Court of Nashville, Davidson County, Tennessee, Division II, the Honorable John L. Draper presiding, before a jury.

The two petitioners, Gordon F. Ragland and James A. Wright, Jr., now before this Honorable Court, were tried in the Court below along with defendants Oscar C. Prock, Gary Waddey and Dean Smith. Gary Waddey's case ended in a mistrial and Dean Smith was convicted and did not appeal.

The State of Tennessee presented some sixteen (16) witnesses who testified on behalf of the State.

Before the case came to trial, defense counsel for Gordon F. Ragland and James A. Wright, Jr., moved the Court for a severance which was denied and exception thereto taken. Also, before the beginning of the presentation of evidence, defense counsel for Gary Waddey moved the Court for a copy of a statement given by Dean

Smith, a co-defendant, if the same was to be introduced in evidence by the State. Said motion was joined by other defense counsels for Ragland, Prock and Wright. Said motion was denied with exceptions taken and the Attorney General for the State of Tennessee assured all counsel that no deals or agreements had been made with defendant Smith or his counsel as to his testifying on behalf of the State. Defense counsel for the two petitioners now before this Court relied upon the statement of the Attorney General and counsel for defendant Dean Smith and proceeded to trial with this in mind.

The seating arrangement of the parties was such that the defendants Gordon F. Ragland and Oscar Clinton Prock, were placed in a position of having rebuttal questions asked by defendant Smiths' counsel in defense of their ccunsels' cross-examination of each witness for the State of Tennessee. It appeared that Mr. Smiths' counsel felt that his client would be convicted and it was his desire to make sure that all defendants were convicted with him. This situation was totally contrary to the best interest of justice and brought about many heated arguments both in front of the jury and in their absence. There were numerous motions for both a severence and a mistrial throughout the trial of this case, each of which were denied with exceptions noted. The conflct of interest between the defendants was evident from the very beginning. Just to show the Court one example of this, when defense counsel for Gordon F. Ragland moved to supress evidence concerning what he considered an illegal search and seizure and said motion was sustained by the Court, and evidence withdrawn by the Attorney General, Lee Allen, counsel for defendant Smith, noted his exception to the ruling of the Court and was very unhappy when this illegal evidence against Gordon F. Ragland was not admitted for the jury's consideration. (See pages 68 and 69 BE).

As the trial progressed, the State of Tennessee successfully over objection of counsel admitted confessions or statements by both defendants Gary Waddey and Dean Smith, which were an outright violation of the law as set out in **Bruton v. United States**, 391 US 143, and **Roberts v. Russell**, 392 US 293, which stated that statements by one co-defendant which implicates other defendants, could not be admitted in a joint trial. At this point, motions for a severence and mistrial were overruled and exceptions noted.

Later in the States' case, defendant Dean Smith was called on behalf of the State of Tennessee to be a witness, out of order, not as a witness in his own defense, but to give evidence on behalf of the State. Even at this point, the Attorney General and defense counsel for Dean Smith stated that there was no "agreement" no deal. Again severences and mistrials were moved for and again denied and exceptions noted.

It was obvious that the agreements had been reached with defendant Smith and his counsel and all parties should have been advised of this at the outset of the trial and furnished copies of Dean Smith's statement as set out in **Miranda v. United States**, 384 U.S. 436, 1966.

With this the State closed their case and all defendants, with exception of Dean Smith, moved for directed verdicts, which was denied and exceptions noted.

Defendants Ragland, Wright and Waddey took the stand in their own behalf and at this time the conflict of interest between Wright and defendant Waddey became quite evident. The defendants Ragland and Prock were caught in the middle of a vicious attempt of defendants Wright and Waddey to blame each other. Waddey testified he bought the set from Wright and Wright testified he bought the set from Waddey and both denied

they knew the sets were stolen. Again it was evident that these five people should never have been tried together by the same jury. With this, all defendants closed.

During the opening argument of Assistant District Attorney Clark Tidwell, he stated, "What will be the ending, if you or I were going to put a last chapter to this book about **TWO THEIVES AND THREE POLICEMEN**? How would you end it? That, Gentlemen of the jury is for you to decide. That's for you to decide." (530-531-532BE). At this point defense counsel for Ragland and Prock objected and the Attorney General attempted to withdraw his statement but the damage was done.

The defendants Ragland and Prock received three (3) years at the hands of the jury as revised by the Court of Appeals and the defendant Wright received a maximum seven (7) years as revised by the Court of Appeals. Their motions for a new trial were overruled and their appeals were seasonably perfected to the Court of Criminal Appeals for the State of Tennessee. Said appeals were revised and affirmed by said Court.

The proof as to Gordon F. Ragland was given by codefendant Smith who was the only person placing Gordon F. Ragland at the scene of the alleged burglary. Statements given by defendant Waddey and Smith were admitted in violation of Bruton v. US (391 US 123, 1968). Had the Court followed Bruton and not admitted the extrajudicial statement, then possibly neither of the defendants would have taken the stand. At this point the error was committed and the State contends that the error was corrected by both defendants later taking the stand. However, the statements of both Smith and Waddey were not properly corroborated by any other witness as to petitioners Ragland and Prock. Two witnesses testified they

bought televisions from Ragland but they could not testify they were the same sets listed in the indictment, or even identify the set shown them in open court.

Petitioner James A. Wright, Jr. was only charged with receiving and concealing two television sets being serial numbers 96EB2722 and 10BC50025, both being R.C.A. brand sets. Co-defendant Waddey testified he sold a television set to his neighbor, J. R. Sturdivant, and other proof shows this turned out to be set number 96EB2722. There was a price tag introduced (BE27) which was never connected as coming off either set which Mr. Wright was charged with as Mr. Waddey was charged also with receiving and concealing two RCA television sets and there was another pick up at the home of William Don Smith and he was never charged. The tag was allegedly found under Mr. Wrights home but it was never proved it came from one of the two sets Jim Wright was charged with. Mr. Sturdivant did not know James A. Wright nor had he ever dealt with him, only Waddey.

The other set James A. Wright was charged with was an RCA Serial number 10BC50025 but Mr. Bowling testified the set he recovered from Mr. Russell was number 10BC54025 therefore, testimony was not in reference to one of the sets Mr. Wright is charged with and therefore should be disregarded, as it fails to corroborate the Waddey testimony. Mr. Russell could only say it was an RCA set and this was correcting his original testimony that it was an Admiral set. James A. Wright, Jr. testified that he sold Mr. Russell a set he got from defendant Waddey but according to the proof it was not the set recovered from Mr. Russell as the serial number Lt. Bowlin testified about does not appear on this indictment. This serial number 10BC54025 is also not among the inventory sheet which are exhibit number 2.

REASONS FOR GRANTING THE WRIT

1. When a surprise witness is presented by the prosecutor the defendant below has a right to confrontation in the broadest sense of the word. However, it is obvious that if the accused lacks the opportunity to prepare for cross-examination then all other safeguards of the right to confrontation are rendered meaningless. That is, the right to cross-examine witness is more than the mere opportunity to question a witness in court, rather it extends to the right to prepare one's defense before trial. Dean G. Smith's lawyer would not confer with other defense counsel nor would he allow his client to discuss the case with the other accused or their counsel. This prevented the petitioner knowledge of substantially what the prosecution would offer and who he would bring forth. Without this essential knowledge an accused cannot properly prepare his defense nor prepare to properly exercise his right of confrontation of the witness. In the instant case not only did he not have prior knowledge that co-defendant would testify but was assured that defendant would plead "not guilty" which he stood on until immediately prior to his counsels argument when the plea was changed. To further assure counsel for the petitioners that defendant Smith would not turn states evidence the confessions of two of the five accused were put in evidence over objection of all counsel except Smith in violation of the Bruton case as at the time it was put in the prosecution was still claiming "no deal". If the prosecution did not know at this point that defendant Smith was going to testify then it was fatal error and if he knew then he was intentionally trying to mislead counsel for the petitioners and acting in bad faith. This seems to come under the viewpoint so aptly stated by Justice Fortes, "The States obligation is not to convict, but to see that, so far as

possible, Truth emerges. This is also the ultimate statement of its (States) responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment." **Giles v. Maryland,** 386 U.S. 66-98 (1967). The case main holding that prosecution should have disclosed material evidence to the defense and at least not try to "hood wink" the accused counsel. This prevented counsel for the petitioners from being able to plan his case and present his case with the thought in mind to reduce the injurious effect of Dean G. Smith's testimony. In **Roviaro v. U.S.,** 353 US 53 (1957), the accused had demanded the name of an informer who might have helped the defense, however, the prosecution refused. However, the Supreme Court held that if there was the possibility that the man could present favorable evidence for the accused then his name should be made known. The Court stated:

> "The problem is one that calls for balancing the public interest in protesting the flow of information against the individual's right to prepare his defense." Id. at 62.

Obviously this case is not factually in point with this case but this case indicates that the court is concerned with an accused receiving a fair trial, free from surprise witnesses, and that this includes the right to prepare a defense. Counsel feels the misleading statements and actions of the prosecutor and defendant's Smith's counsel bring this under the holding of Roviaro.

There is another line of cases from which counsel would like to draw some support. These are the cases which place a duty of the prosecution to disclose material evidence to the accused. The case of **Brady v. Maryland,** 373 US 83 (1963), held that the suppression of material evidence violated due process even in the absence of bad faith on the part of the prosecutor. Disclosure has also been required even when the defendants attorney failed

to request it, **Barbee v. Warden**, 331 Fed2, 842 (4th Cir. 1964). While these cases do not specifically indicate that disclosure is required as a matter of confrontation, it seems clear that the duty to disclose is based on the Defendants right to prepare his case as well as his right to prepare for the confrontation of witnesses.

Certainly, there can be no less duty on the prosecution to make known to the accused (especially when he is asked), the fact that the prosecutor intends to call one of the co-defendants as a witness. This would, as a matter of fairness, give the accused a chance to prepare his case so as to cope with the witness, and properly confront him.

2. The decision of the Court below as to the legality of a search of petitioner's home and automobile was a violation of the Fourth Amendment to the United States Constitution. The officer testified they had a right to search incidental to arrest (BE 132) but under the circumstances that was not sufficient to justify the search. The petitioner had invited the officers in but they refused to come in and asked him to come out in the yard. He complied with their request and was arrested out in the yard. After he was arrested and his person searched, the officers even talked about being his superior officer. These superior officers told him they were going to search his house and his car. He, being a patrolman, he knew it would do no good to protest. He was under duress and coercion (certainly implied) therefore he knew it would be useless to protest..

Some of the cases in point follow:

> "Consent to search and seizure must be proved by clear and positive testimony and it must be established that there was no duress or coercion, actual or implied; and where it appears that defendant was

under arrest when consent was allegedly given, government's burden is particularly heavy. U.S. v. Wallace, DCDC 1958, 160 F.Supp. 859. U.S. v. Barton, DCMass. 1967, 282 F. Supp. 758, 787.

"In order to constitute a voluntary consent it must clearly appear that the search was voluntarily permitted or expressly invited and agreed to by the person whose right is involved. In addition, such person must be cognizant of his rights in the premises, the consent must not be contaminated by any duress or coercion and the government has the burden of proof." Wren v. U.S., C.A.10th, 1965, 352 F 2d 617, 618, certiorari denied 86 S. Ct. 1469, 384 U.S. 944, 16 L.Ed. 2d 542.

"This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." Bumper v. State of North Carolina, 1968, 88 S.Ct. 1788, 1792, 391 U.S. 543, 548-549, 20 L. Ed. 2d 797.

"When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." Bumper v. State of North Carolina, 1968, 88 S. Ct. 1788, 1792, 391 U.S. 543, 550, 20 L. Ed. 2d 797.

"If a search is made without a warrant, government must show a consent that is unequivocal and specific, freely and intelligently given, and thus an invitation to enter one's house, extended to armed officers who demand entrance, is usually to be considered as an invitation secured by force. Judd v. U.S., C.A.1951, 190 F.2d 649, 650-651, 89 U.S. App. D.C. 64.

The admission of this inadmissible evidence contributed to the conviction of both petitioners and further enhanced the position that they were denied "Due process of Law."

CONCLUSION

Wherefore, it is respectfully requested that this petition for the Writ of Certiorari to the Supreme Court of the State of Tennessee, should be granted.

JAMES S. PATRICK, JR.
202 Public Square
Nashville, Tennessee 37201
Attorney for Petitioners

APPENDIX A

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall abridge the privileges or immunities of citizens of the United States; or shall any state deprive any person of life, liberty, or property, without due process of law, not deny to any person within its jurisdiction the equal protection of the law."

APPENDIX B

The Court of Criminal Appeals of Tennessee
at Nashville
Appeal in Error From the Criminal Court
of Davidson County
Honorable John L. Draper, Judge

Gordon F. Ragland, Oscar Clinton Prock and James A. Wright, Jr., Plaintiffs in Error, vs. State of Tennessee, Defendant in Error.	No. 4956 Below. Burglary and Receiving and Concealing Stolen Property.

For Plaintiff in Error:

E. Lee Allen, Stahlman Building, Nashville, Tennessee; James S. Patrick, Jr., Stahlman Building, Nashville, Tennessee; Dan Garfinkle, Stahlman Building, Nashville, Tennessee; Mr. Jack Norman, Jr., 213 3rd Avenue North, Nashville, Tennessee; William C. Wilson, Stahlman Building, Nashville, Tennessee.

For Defendant in Error:

David M. Pack, Attorney General, Nashville, Tennessee; Thomas E. Fox, Deputy Attorney General, Nashville, Tennessee; Thomas H. Shriver, District Attorney General, Nashville, Tennessee; A. A. Birch, Assistant Attorney General, Nashville, Tennessee; John J. Hollins, Assistant District Attorney General, Nashville, Tennessee.

Judgment Modified and Affirmed

JOHN A. MITCHELL, Judge

Opinion Filed: Dec. 29, 1970.

OPINION

Gordon F. Ragland, Oscar Clinton Prock, Dean G. Smith, James A. Wright, Jr. and Gary Waddy, who will be referred to as defendants or by name were on April 12, 1967 indicted by the Grand Jury of Davidson County, Tennessee on an indictment charging Gordon F. Ragland, Oscar Clinton Prock, and Dean G. Smith in the first count with burglary by the felonious breaking and entering of the business house of National Stores Corporation, a corporation d/b/a National Stores Appliance Center on the ... day of January, 1967, and with grand larcency of a radio and television sets of the value of $1900.00 the property of said corporation.

The second count of the indictment charged the same defendants on the same date did unlawfully fraudulently and feloniously receive, buy or conceal or aid in concealing a radio and television sets, described in the indictment, of the value of $1900.00 belonging to the above named National Stores Appliance Center, knowing them to have been stolen.

The third count of the indictment charged James A. Wright Jr., on the same date did unlawfully and feloniously receive, buy, conceal and aid in concealing two television sets, described in the indictment of the value of $1,000.00, the property of or in possession of the above named National Stores Appliance Center, knowing them to have been stolen.

The fourth count of the indictment charged Gary Waddy on the same date did unlawfully and feloniously receive, buy, conceal and aid in concealing two RCA console color television sets of the value of $1,000.00, the property of or in the possession of the above named National Stores Appliance Center, knowing them to have been stolen.

The minutes showed that the defendants Gordon F. Ragland, Oscar Clinton Prock, Dean G. Smith, James A. Wright, Jr., and Gary Waddy were arraigned on April 28, 1967 on the charges contained in the foregoing indictment.

That Honorable James Patrick, Jr., was attorney for defendants Ragland and Prock.

Honorable E. Lee Allen was attorney for defendant Smith, Honorable Dan Garfinkle was attorney for defendant Wright, Honorable Jack Norman Jr., was attorney for the defendant Waddy, and Honorable A. A. Burch, Jr., was assistant District Attorney General for the State.

The defendants pleaded not guilty to the charges, and the case was continued until June 21, 1967.

The minutes of April 9, 1968 showed that Honorable William C. Wilson was also attorney for the defendant Wright.

The trial commenced April 16, 1968.

The minutes of April 20, 1968 show that the defendant Dean G. Smith through his counsel changed his plea of not guilty to a plea of guilty of attempt to commit a felony. The bill of exceptions shows this took place on April 20th during argument of counsel, and after all the evidence was in.

Before the trial commenced, the defendants made a motion for change of venue and for severances and repeatedly during the trial the defendants renewed their motions for severances and motions for mistrial which motions were overruled and exceptions preserved.

Before the hearing of testimony commenced, defendants' counsel apparently were apprehensive about whether any secret deals or arrangements had been made between the prosecution and some of the defendants, that promises

or concessions had been made or were in the "offing", for testimony or information.

That counsel for the defendants stated to the Court that they had relied all along on the fact that all of the defendants would stand at the bar on a plea of not guilty and that there had been no favor, promise, reward, or deal made, and they had every reason to believe at that stage that it was not so and they again contended there was material conflict of interest between the defendants.

The trial judge stated he had been assured in open court before the matter was taken up, by the Attorney General that no deals had been made.

Defense counsel stated they had then been there twenty-four hours, two whole days, and during that time there could have been other arrangements made, and they had reason to believe they either had been made, or were in the offing.

The Attorney General stated "no deals made."

The Court said, "Let the record show that General Hollins said no deals have been made and the status has not changed since yesterday morning, with that understanding the Court overruled the motions, and defendants excepted.

The minutes also show that on April 20, 1968 the trial jury reported a verdict, "that they find the defendant Ragland guilty of burglary in the third degree and assess his punishment at confinement in the State Penitentiary for a period of not more than three years and they also find the defendant Ragland guilty of grand larceny and assess his punishment at confinement in the State Penitentiary for a period of not more than three years, and that they further find the defendant Ragland guilty of receiving and concealing stolen property over the value of $100.00 and fix his punishment at confinement in the

State Pentitentiary for a period of not more than three years."

The jury found the defendant Prock guilty of burglary in the third degree and imposed a sentence of not more than three years in the penitentiary and guilty of grand larceny and not more than three years in the penitentiary but find Prock not guilty of receiving and concealing stolen property.

The jury found the defendant Dean G. Smith guilty of burglary in the third degree and fixed his punishment at not more than three years in the State Penitentiary, and also found him guilty of grand larceny and fixed his punishment for that offense at not more than three years in the State Penitentiary, and also found him guilty of receiving and concealing stolen property over the value of $100.00 and fixed his punshment at not more than three years in the State Penitentiary.

The jury found the defendant, James A. Wright, Jr., guilty of receiving and concealing stolen property over the value of $100.00 and fixed his punishment at not more than seven years in the State Penitentiary.

The jury could not agree on a verdict as to the defendant Gary Waddy and a mistrial was entered in his case.

The trial court pronounced judgment upon the defendant Gordon F. Ragland for burglary in the third degree and not more than three years nor less than three in the penitentiary, and for not more than three years nor less than three years for grand larceny to run concurrent with the sentence on the burgalry conviction. The minutes fail to show judgment pronounced on the conviction of receiving and concealing stolen property as to Ragland.

The trial court pronounced judgment upon the defendant Oscar Clinton Prock for burglary in the third degree and not more than three nor less than three years in the

penitentiary and for grand larceny not more than three or less than three years in the penitentiary to run concurrent with his burglary conviction.

The court pronounced judgment upon the defendant Dean G. Smith for burglary in the third degree and not more than three years nor less than three years in the penitentiary, and for grand larceny and a sentence of not more than three years nor less than three years in the penitentiary to run concurrent with his sentence in the burglary conviction.

The court pronounced judgment upon the defendant James A. Wright, Jr., for receiving and concealing stolen property over the value of $100.00, for not more than seven years nor less than three years in the penitentiary, the sentence not to run concurrent with any former convictions.

The defendants Ragland, Prock, Smith and Wright gave notice that they desired to make motions for a new trial and they were allowed thirty days to file their motions.

The defendant Dean G. Smith filed but withdrew his motion for a new trial.

After the motions for a new trial had been heard and overruled as to Ragland, Prock and Wright, they appealed to this Court and have assigned errors.

In order to properly consider the important question of corroboration of an accomplice which has been raised in this case, we have found it necessary to conduct an extensive review of the evidence.

The State, by the testimony of Lieutenant Jack Bowling was permitted to introduce the confession of one of the defendants Dean G. Smith, over the objections of the defendants. Then near the close of the State's proof in chief, the State called the defendant Dean G. Smith as a witness to which the defendants Prock, Ragland, Wright

and Waddy objected and made motions for severances and for mistrials which were overruled to which they excepted.

The testimony of the States' witnesses showed the business house of the National Stores Corporation at Green Hills in Nashville was burglarized on the night of January 8, 1967. A radio and several thousand dollars worth of television sets were stolen. Dean G. Smith, a co-defendant, who was a policeman at the time testified that Gordon F. Ragland and Oscar C. Prock committed the burglary while he, policeman Smith in uniform stood watch for them in his car nearby. Smith testified that a short time before the burglary the defendant James A. Wright Jr., another policeman who was Smith's superior planned the burglary. The defendant Wright instructed him to meet Oscar Prock and Gordon Ragland at the Krystal on Franklin Road around 1.30 A.M. and proceed to burglarize the National Store at Green Hills. That he met Prock and Ragland at the Krystal on Franklin Road. They were in a light baby blue pick-up truck with a white top and a wooden canopy over it. They went to Green Hills Shopping Center in the pick-up truck, Prock driving, Smith followed them. When they got to the National Stores Appliance Center, they instructed the defendant Smith to park in the lot and be the look-out, and if warning was necessary he was to turn on his red light. So he stood watch for them. They drove around at the back of the store, and after about thirty minutes, Ragland and Prock came around to the front door of the National Stores Appliance Center and they pryed the front door open and entered. They did not come back out the front door. Prock's pick-up truck was small so they had to make more than one trip.

That Smith in the police car followed them to Ragland's home, for their protection, so they could unload the televisions from the truck into his house.

Defendant Smith said Officer Ray stopped him and they talked for some length of time. That the matter discussed

was that he, Smith was out of his zone. That he saw the pick-up truck proceed North on Hillsboro Road. He called Ray's attention to the Davidson County map he had in his vehicle to divert Ray's attention from seeing the Prock vehicle, so he would not know it was present in the Green Hills area.

That he was told by defendants Wright, Ragland and Prock that the pick-up truck belonged to Prock who was the driver.

That they took most of the sets directly from the Green Hills area to Gordon Ragland's home.

At a later time in the morning while it was yet night, two console T.V.'s fell out of the back of the pick-up truck at the intersection of Thompson Lane and Nolensville Road. There was a Gulf Station on the corner which was open, he could see lights on and an attendant inside. That he was about the length of two vehicles directly behind the pick-up truck.

That the lights of his car were on when the T.V.'s fell out of the pick-up truck, he turned his lights down to park so there would be no direct light on the pick-up truck. Ragland and Prock got out of the pick-up truck each on their own side and came around and loaded the T.V.'s back in the pick-up truck.

The defendant Smith further testified they delivered five console T.V.'s to defendant Wright's home. That he counted nineteen portables and seven console T.V.'s and several radios stolen from the National Stores Corporation.

Later he talked to defendant Wright about the amount of T.V.'s stolen and Wright said that there ought to be quite a bit of money coming out of the deal. Wright was more familiar with selling prices. Wright agreed to sell one set to Smith's brother Don for $200.00.

Smith swore they got a U-Haul-It truck at an Esso Service Station on Murfreesboro Road just down from Thompson Lane. Wright rented the van and drove it to Gordon Ragland's house, where Ragland, Wright and the Witness Smith picked up a color T.V. console and took it to Wright's house, there they got two color T.V.'s from Wright's basement under his house. It's not really a basement; it's under the house which is on a grade; the door is in the framework of the basement. They took the remaining set on to Gary Waddy's house. Wright and Smith carried it into the den, Ragland held the door for them.

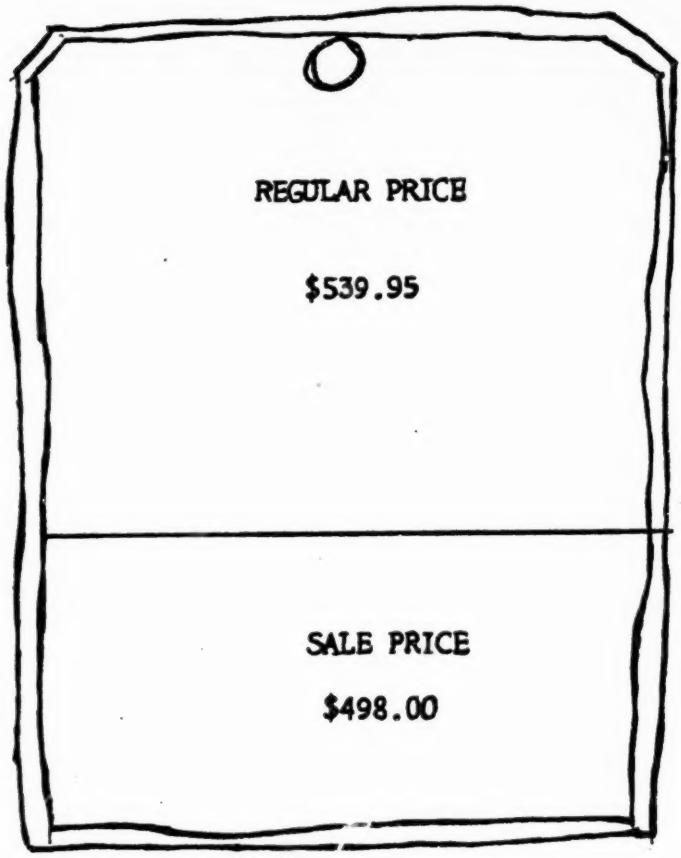
That Smith, Ragland and Wright took a portable T.V. to LeBow's home where Wright took it into the house.

Douglas Dennis, a Metro Police Officer for eight years, testified that he arrested the defendant James A. Wright at his home about 2:00 P.M., January 22, 1967, and searched his home where he found a price tag, State's Exhibit No. 1, underneath his house. It was about a half basement; you can't stand up in parts of it; there is a dirt area underneath the house. He turned the tag over to Lieutenant Bowling.

The manager of the store burglarized in this case identified this price tag or ticket as one that was on an RCA color T.V. set in their store which had been marked down from $639.95 to $495.00. This tag and the T.V. were missing from the store when he got back to the store after the burglary. Several days later two officers brought the tag to the store and asked him if he could identify it, which he did and told them the T.V. set it came off.

The price tag was ordered marked Exhibit No. 1 of the State's case.

Because of the significance of this exhibit on the subject of corroboration of the accomplice we have reproduced it here.



5¼ in.

2½ in.

Lt. Jack Bowling of the Metro Police Department who in January, 1967 was a Sergeant in charge of Internal Affairs testified he searched the automobile of defendant, James A. Wright, with Wright's consent and in the trunk of his car found State's Exhibit No. 6, a plastic cover that covers the back portion of a picture tube of a T.V. set received from Mr. Russell. That he made a picture of this plastic article which is filed as State's Exhibit No. 7.

We think it is appropriate to point out here that this picture shows a cup-shaped or bowl-shaped plastic article probably 2 to 4 inches in diameter being held up to the back of a T.V. set.

Lt. Bowling also testified that the defendant Waddy was a patrolman at the time, and Waddy said he bought an Admiral color console television from Patrolman James Wright about the 9th of January, 1967 and it was delivered to his home in a van type truck, that he paid about $300.00 for it. That it was delivered by James Wright, Gordon Ragland and another person possibly D. G. Smith. He said that later he bought another console color television again from James Wright for $250.00. That he sold this set to his next door neighbor for $270.00, making $20.00 for himself. Mr. Bowling testified that he went to Sturdivants' home and recovered an R.C.A. color T.V. console, model No. GG624W, serial number 96EB2722 recovered January 22, 1967.

Mr. Bowling further testified that he was present when the defendant Smith gave a statement, was advised of his rights. At this juncture the court admonished the jury that the statements made by Mr. Waddy to Mr. Bowling is not evidence against any of the co-defendants who were not present at the time the statement was made and couldn't be considered by the jury as evidence against any other co-defendant unless that co-defendant was present.

During the introduction of the confessions, the trial judge repeated the following instruction to the jury:

The Court: "I think I have admonished this jury, and I have the utmost confidence that they will listen to my admonition, and I repeat it to you gentlemen. Any statement made by one defendant, out of the presence of his co-defendants, cannot be considered against those people who are absent. It is only evidence against the defendant making the statement, and is not evidence against the others who were not present, in any respect, and must not be considered as such, against any other defendant who is not present when that statement was made."

The defendant Gordon Ragland, age 37, took the witness stand and testified that he did not know anything about the burglary of the National Stores Appliance Center on January 8 at Green Hills Shopping Center except what he had heard and been told. That he did not participate in the burglary in any way, that he did not enter that store on that night. He testified that he had known the defendant Prock practically all his life. That they came from the same county and that he had ridden in his pick-up truck. That Procks pick-up truck was a 1965 or 1966 model Chevrolet. That is was light blue and white, a camper, that he believed there was an eight inch board around the metal part on the bed. He admitted that he had known Jack Pardue off and on for 10 or 12 years. That he did not sell a T.V. set to Jack Pardue and did not know why Jack Pardue would swear that he did. He testified he did not hardly know Coy Mosier, that he did not sell him a television set and did not know why Coy Mosier would testify that he did. He testified he did not really remember where he was on January 8, 1967, that he was probably at home in bed, and that if he had been at home in bed his wife would have known about it. But that he did not subpoena her as a witness that he had understood "an alibi witness was no good, especially from your own

people." He testified he had never been arrested for or convicted of any felony but might have been involved in some drinking some time back. He denied that he had anything to do with or any knowledge of delivering the television sets to Mr. Wrights' house or to Mr. Russell or Pardue and Mosier. He testified he knew the defendant, Dean G. Smith. That he had seen Smith a time or two over at Mr. Wrights' house. That he had a girl friend over there one time as they were visiting Mr. Wright.

The defendant James A. Wright, Jr. testified he had been a Metropolitan Police Officer for six years. That at the time he had known patrolman Dean G. Smith for a few short months and had known patrolman Waddy for a longer period of time. That in January (1967), he actually had three television sets that one of them was his own. That he had an R.C.A. color television, looked like it had been used. He had gotten it from Mr. Waddy and he had only had it a day or two. He (Waddy), said he knew a man that had a T.V. repair shop and had some that were damaged, that he could get it cheap. On that basis he took the T.V. set at the price of $150.00 but did not pay him for it. That he contacted Cotten who came with Mr. Russell to his house. The defendant Wright further testified that he had another T.V., a portable, which he had obtained from Mr. DeBow, a police officer, but it belonged to Mr. Smith. That he had learned from Mr. DeBow that he wanted a T.V. That Mr. Smith had one that he wanted to sell and asked him if he would go and show him where DeBow lived, and she went to DeBow's home, got the T.V. and brought it to his house until he could notify Smith. That Mr. Smith said he wanted $50.00 for the T.V. That he did sell a T.V. set to Mr. Russell for $200.00 cash, out of which he would have made a profit of $50.00. That he did not deliver any of these other sets. That the only set he had anything to do with was the one that went to Mr. Russell. That he actually did possess

it but did not pay for it and made no effort to conceal the set and had no knowledge whatsoever that it had been stolen by anybody. The defendant Wright further testified that he was acquainted with the defendants Ragland and Prock. That he had met Prock in the body shop business as he still did that kind of work (that he was a mechanic and wrecker driver). That he has been convicted of receiving stolen property but that the case is now pending on appeal. He denied that he knew anything about the television set that Mr. Sturdivant is supposed to have bought.

The defendant Wright further testified on cross-examination that the T.V. set, serial number 10BC50025 he obtained from Mr. Waddy about the middle of January 1967. That Waddy brought the T.V. to his house in his car. That he did not pay for it until after he got the money from Mr. Russell. The price was $150.00. The T.V. was a used R.C.A. console set. The money transaction was between him and Russell, that "Waddy's statement to Lt. Bowling that he got that set from me is not true." Wright could not give any explanation of the tag (State's exhibit No. 1), being found under his house.

The defendant Wright denied that any T.V. sets from the burglary were taken to his house, he said, "He, Russell and Smith did not deliver a television set to Mr. Waddy's house."

The defendant Wright admitted that he did rent from the Thompson Lane Esso Service Station a truck (or van), a little panel job. That he signed the rental contract dated January 9, 1967, and put up a deposit of $20.00. The defendant answered that he did not remember what he used the truck for. He admitted that his relationship with Ragland, Prock, Waddy and Dean Smith was "we were just friends." He admitted that the T.V. set that he took to

Mr. Russell was the one he got from Mr. Waddy and he actually paid him $150.00 for it.

The defendant Waddy testified that he and Wright worked the same detail, both lived in Woodbine and rode back and forth together.

That there is not a word of truth to what Wright testified.

That Mr. Wright called him on the phone and asked if he would be interested in buying a color T.V., he told him he might and asked him what was wrong with it. Wright said a friend of his got some that was damaged in the freight.

That defendants Ragland, Dean Smith and Wright, with the T.V. in a van came to his house, his wife was there, they brought it into his house, an Admiral color T.V. 23 inch screen and he promised to pay $300.00. The next day at Wright's request he, Waddy helped Wright deliver a T.V. set to Mr. Russells' house.

Waddy further testified Mr. Sturdivant wanted to buy and he delivered a T.V. set to Mr. Sturdivant who paid him a check of $270.00. "I took the money and I paid Mr. Wright for my set and for Mr. Sturdivants' set, I made $20.00 at that time. I paid Mr. Wright $250.00."

Waddy further testified he had no knowledge of the television sets being stolen and when he discovered they were he told his superiors all he knew about it, and did his best to rectify the matter.

"At the time I bought the set from Mr. Wright, and the Sturdivant trade, and at the time I helped Mr. Wright take the set to Mr. Russell, I did not have any knowledge of the fact that the T.V.'s were stolen. As soon as I had any reason to suspect the T.V.'s were stolen, I called Mr. Wright immediately. Mr. Wright was a friend of mine,

and I trusted him. I went at Lieutenant Bowling's request and told them everything I knew about it."

Mrs. Gary Waddy testified that a television set was brought to their house about eight-thirty or nine at night in January. That she works and had already prepared to go to bed. That there were several individuals but she saw just one, Mr. Wright.

The defendant Oscar Clinton Prock did not testify.

The defendant James A. Wright, Jr. has adopted the same assignments of error which have been filed on behalf of Oscar Prock and Gordon Ragland.

The first and second assignments of error are that: "There is not sufficient evidence to support the verdict of the jury". "That the verdict was contrary to the law and evidence."

We will consider these two assignments of error together and in doing so we are bound by the rule restated by our Supreme Court in Gann v. State, 214 Tenn. 711, 383 S.W. 2d 32, as follows:

> "In considering this case on appeal, we do so with the presumption that the defendant is guilty as found by the jury and approved by the court. His presumption of innocence disappears after conviction and he is presumed to be guilty here. The jury and the trial judge see and hear the witnesses face to face and are in a far better position to determine who is correctly detailing the truth of the matter than are we who see only the record. Holt v. State, 210 Tenn. 188, 357 SW 2d 57 (1961); Gang v. State, 191 Tenn. 468, 234 S.W. 2d 997 (1946); Ferguson v. State, 138 Tenn. 106, 196 S.W. 140 (1917).
>
> Likewise, it has long been the law of this State that the credibility of witnesses and conflicts in testimony

> are settled by the verdict of the jury when approved by the trial court. In this case much of the evidence presented by the State is diametrically opposed to the statements of the defense witnesses. Under such circumstances, it is the duty of the jury to determine the truth of the situation, following closely the instructions of the judges. In so doing, the jury should reconcile any conflicts of the testimony, which may be reconciled then the duty of the jury is to accept that which they think true and reject the false. Holt v. State, supra; Anderson v. State, 207 Tenn. 486, 341 S.W. 2d 385 (1959)".

One of the co-defendants Dean G. Smith, who was a participant in the burglary, "stood watch" while Oscar Prock and Gordon Ragland broke and entered the store then all three of them transported the stolen goods to the home of the defendant James A. Wright, Jr. The proof showed some of the stolen goods were found in the possession of Wright and other witnesses testified they bought some of the stolen goods from Ragland, and the proof showed the stolen goods were hauled away in Prock's truck.

We recognize that the law requires corroboration for the testimony of the accomplice Smith.

Our Supreme Court has pronounced the following rules by which we are bound in considering the question of corroboration of the accomplice.

In **Garton v. State**, 206 Tenn. 79, the Court said:

> "The rule is, that, to sufficiently corroborate the testimony of the accomplice, there should be some fact testified to entirely independent of the accomplices' evidence, which, taken by itself leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it. The corroboration must consist in some fact or circumstance that

affects the identity of the party accused. The corroboration is sufficient that satisfied the jury of the truth of the accomplices' statements. **Clapp v. State,** 94 Tenn. 186, 195, 30 S.W. 214.

One of the latest and most enlightening statements pronounced by our courts, with reference to the sufficiency of evidence to corroborate the testimony of an accomplice in the commission of a crime, is to be found in a most able opinion by Mr. Justice Burnett in the case of **Stanley v. State,** 189 Tenn. 110, 222 S.W. 2d 384, 386, from which we quote the following excerpts:

" 'The degree of evidence which shall be deemed sufficient to corroborate the testimony of the accomplice is for the determination of the jury. The law is complied with if there is some other evidence fairly tending to connect the defendant with the commission of the crime, so that this conviction will not rest entirely upon the evidence of the accomplice' (Quoting from **Clapp v. State,** supra.)

"This Court has likewise held that rather slight circumstances may be sufficient to furnish necessary corroboration. **Winfree v. State,** 174 Tenn. 72, 123 S.W. 2d 827."

* * * * * * *

" 'The corroboration need not be conclusive, but it is sufficient if this evidence, of itself, tends to connect the defendant with the commission of the offense, although the evidence is slight, and entitled, when standing by itself, to but little consideration. Moreover, if the verdict is founded on slight evidence of corroboration connecting the defendant with the crime, it cannot be said, as a matter of law, that the verdict is contrary to the evidence.' Section 753, page 1271, supra."

* * * * * * *

The State had called the defendant Dean Grit Smith as a witness and his testimony was substantially the same as his confession.

The defendants contend the introduction of inculpatory admissions of co-defendants Smith and Waddy were in violation of the rule in the Bruton case.

Bruton v. U.S., 20 L. Ed. 2d 476, 391 U.S. 123, 88 S. Ct. 1620, was a case where Evans and Bruton were convicted of armed postal robbery. The postal inspector testified that Evans confessed that he and Bruton committed the robbery. The trial court instructed the jury that Evans' confession was competent evidence against Evans but must be disregarded and not considered against Bruton.

The Supreme Court of the United States reversed and held that since Evans did not testify and was not subject to cross-examination that the introduction of Evans' confession violated Bruton's sixth amendment rights of cross-examination, and was an infringement upon Bruton's constitutional rights which could not be avoided by instruction to the jury to disregard the confession as to Bruton.

We find that the rule in the Bruton case is not applicable to the case at bar, because the co-defendant Smith, whose confession was introduced in evidence, took the witness stand for the State and testified as an eye witness to the burglary and his testimony was substantially the same as his confession and the co-defendant Waddy also took the witness stand and testified, and the other co-defendants had ample opportunity to, and did, subject them to cross-examination.

We find the testimony of the following witnesses provides adequate corroboration for the testimony of the accomplice Dean G. Smith:

Denzil Cotton, Cloyd Russell, Matthew Jimmy Allen, Coy Mosier, Robert Pardue, Robert P. Russell, James Maxwell, Ray Ray and Gary Waddy.

Denzil Cotten swore that in January 1967, the defendant Wright called him on the phone and said re had a color television set he would like to sell. Cloyd Russell was interested in a T.V. and he went with Mr. Russell to defendant Wrights' house in January 1967 where he saw the two T.V. sets, a color floor model R.C.A. looked like new, and one was a small T.V. He wanted $50.00 for the small and $200.00 for the color T.V. He had known the defendant Wright for four years and never knew him to be in the business of selling T.V.'s.

Cloyd Russell swore he was employed with Federal Fiberglass and Mr. Denzil Byron Cotten who was employed at the same place went with him to the home of the defendant Wright. Russell bought an R.C.A. TV from Mr. Wright in January 1967. Wright and Mr. Waddy then brought it to his house and he paid Mr. Wright $200.00 for it. He learned that it was stolen when Mr. Bowling came to his house and turned it over to him. It was twenty-five inch set, 3 feet tall and about 3 feet long. Mr. Waddy helped load it.

Matthew Jimmy Allen of the Metro Police Department swore that Mr. Prock lived at 309 Tanksley. Mrs. DeVault lives at 313, next house, west. He was familiar with Mr. Procks' pick-up truck. That it was light blue, a late model about 1966, blue with white panels. Mr. Allen also testified he recovered TV's from Robert Pardue and Coy Mosier alleged to have been stolen from National Stores Appliance Center.

Coy Mosier testified that defendant Gordon Ragland approached him in a parking lot and asked him if he wanted to buy a T.V. set, he looked at it, Ragland wanted $50.00 for it. It looked like a new set. He had seen Rag-

and before. he had the set in the back of his car at Neeyes' Paint and Body Shop. Set was recovered from him. He found out Mr. Pardue had a set that was stolen and he brought his in, it was an R.C.A. portable. He paid Ragland cash and never got his $50.00 back. That was in January, 1967.

Robert Pardue swore he lives at 136 Chippendale Drive, Hendersonville. In January 1967, he worked at Cliff's Custom Shop. He knew Gordon Ragland for 15 years. "We are from the same town, Lafayette, Tennessee". That he never knew him to be in the business of buying and selling T.V. sets. He bought an R.C.A. portable T.V. from him, paid him $50.00 cash at a parking lot beside building 91 Polk Avenue. Then police came inquiring. He gave them a statement and turned the T.V. over to them.

Robert P. Russell swore that he worked for the police department and assisted in the arrest of Ragland and Proce. That he got this tag along with James Allen and went to the Green Hills Shopping Center and talked to Mr. McCauley. That he went to the home of Mr. Pardue at Hendersonville and recovered an R.C.A. portable T.V. Set #EB3114, that they also recovered one at Sturdivants, 121 Sterton Road, R.C.A. No. 96EB2722.

James Maxwell worked at night 10:00 P.M. to 7:00 A.M. at George's Gulf Service Station at Thomas Lane and Nolensville Road and that he was on duty at the station in January, 1967. That he heard a noise, looked and saw a pick-up truck with a canopy over it. Something had fallen out of the back end of it. A television or some article of that nature, a large article. That the truck had partially pulled out into the intersection and stopped. That he just remembered seeing a figure and remembered seeing somebody come around that he couldn't identify who it was. The best he could remember was

that they came around the truck then his attention was diverted and he could not remember what happened to the article. That he saw a police car, which probably distracted his attention from the truck. The police car was back of the truck on the rear. It pulled up on the truck. But he could remember its lights were off, he couldn't be sure about that. He couldn't be sure about that. He couldn't identify the policeman or any of the people. It was after midnight and before daylight. That he was within 150 feet or less. That he was positive about the police car. It was a marked police car. About a couple of weeks after that the police asked him about this matter.

Officer Ray Ray of Metro Police Department testified that Green Hills Shopping Center was in his zone and that about eight A.M. he discovered the National Appliance Center had been burglarized. He confirmed the fact that he had been on the early morning shift which started at one A.M. and that during the early morning hours he was on Hillsboro Road and had seen and talked to the Defendant Smith who was coming out of Green Hills area. They talked about the zones. That this particular zone was not Smith's zone but was Ray's zone.

The third and fourth assignments of error are that the Court failed to grant the defendant Oscar Clinton Procks' motion for a directed verdict at the close of the State's proof, and again at the close of all the proof.

These assignments will be considered together. In the first place whether to direct a verdict at the close of the State's proof is in the sound discretion of the trial judge, and this action will not be disturbed unless there was an abuse of discretion and we find none.

In the second place the State had proven by the accomplice that Prock had helped to break and enter the store and that he helped to steal and carry away the goods, that the goods had been hauled away in Prock's

truck driven by him. The proof showed Prock owned and operated the kind of a truck described by the accomplice. Ragland and Prock were life long acquaintances and friends, Wright had gotten acquainted with Prock in the body shop business. Ragland testified Prock had a truck similar to the one described by the accomplice. The question of the sufficiency of the corroborating evidence is for the determination of the jury. **Clapp v. State**, 94 Tenn. 186. Rather slight circumstances may be sufficient to furnish necessary corroboration. **Winfree v. State**, 147 Tenn. 72.

The third and fourth assignments are overruled.

The defendants fifth assignment of error is that:

> "That the jury failed to follow the charge of the court when they convicted Oscar Clinton Prock on the uncorroborated testimony of Defendant Dean G. Smith."

We have carefully examined the record and the Court's charge to the jury and are unable to find any instance in which the jury failed to follow the instructions given by the Court.

The sixth assignment of error is that:

> "That the Court erred when it failed to grant defendants Gordon F. Ragland and Oscar Clinton Prock's motion for a severance which was made prior to the beginning of the trial and several times during the trial, as on several occasions defendant Smith's attorney assumed the role of prosecuting attorney which was highly prejudicial in front of the jury."

If the accomplice Dean G. Smith is telling the truth in his testimony, then the defendants by a common design committed the burglary and larceny and disposed of the

stolen goods in accordance with the planning and direction of the defendant James A. Wright, Jr. The jury and the trial judge evidently believed the testimony of the accomplice Smith. Having entered into a common purpose and design to commit these offenses the defendants were not entitled to have a separate trial. There is no proof to support the allegation that "Smith's attorney assumed the role of prosecuting attorney".

The question of whether to grant a severance is discretionary with the trial judge and as to his action in refusing to grant severance we find no abuse of discretion.

It was held in **Anderson v. State**, 207 Tenn. 486, that:

> "The test of whether one charged with a joint crime is entitled to a severance is whether he would be unfairly prejudiced in his defense by being put to a joint trial; and this is largely a matter within the sound discretion of the Trial Judge, and his exercise of such discretion will not be reversed, unless it affirmatively appears that defendant was clearly prejudiced thereby. **Woodruff v. State**, 164 Tenn. 530, 538, 51 S.W. 2d 843, 845; **Turner v. State**, 187 Tenn. 309, 316, 231 S.W. 2d 281; **Kirkendoll v. State**, 198 Tenn. 497, 522-523, 281 S.W. 2d 243, 254."

We find no prejudice to the rights of the defendants by the Court's failure to grant a severance.

The seventh and eighth assignment of error will be considered together and are that:

> "That Court erred when it allowed the admission of Dean G. Smith in evidence allowing names of co-defendants to be mentioned by officers as at this point Smith had not taken the stand for the State. The State only put this in record so it might be heard by the jury as the Attorney General knew at that time defendant Smith would be a State's witness."

"That the prosecuting attorney had the confession or admission entered into evidence as part of the evidence given by Officer Bolin knowing fully well that defendant Smith would change his plea to guilty during the course of the trial, therefore it could not affect the guilt or innocence of the declarant, but could only be prejudicial to the other defendants who were mentioned in the statement and being tried before the same jury."

Dean G. Smith was a co-defendant jointly on trial in the same indictment with Ragland, Prock and Wright. Smith's confession was competent evidence against him and was introduced by the State. At the time the confession was introduced the trial judge by proper instructions limited to the defendant Smith's case and expressly cautioned and admonished the jury that the confession and statements of Smith could not be considered against any defendant who was not present when it was made and could be considered only aginst Smith.

We find no proof in the record to support the contention that the State knew at that time that the defendant Smith would be a witness, or that he would change his plea from not guilty to a plea of guilty.

The ninth assignment of error is that:

"That the Court erred when it failed to grant defendants Gordon F. Ragland and Oscar Clinton Prock's motion for mistrial when the attorney for Waddy made references to parts of the statement of Dean G. Smith which had previously been excluded from the jury and were not a part of the case being tried and were highly prejudicial before this jury."

When counsel for Prock and Ragland made objection the Court instructed the jury to disregard the statement

about the "safe" excused the jury, and in the absence of the jury, the court cleared the matter up. Then recalled the jury and instructed them again not to consider the statement read by counsel for Waddy. We think the trial judge properly removed the cause for objection and that no prejudice resulted to Prock and Ragland.

> "That defendants Gordon F. Ragland and Oscar Clinton Prock were at a considerable disadvantage because of the seating arrangement as counsel for defendant Smith was able and did ask rebuttal questions for the State after witnesses had been examined by defense counsel. This was highly prejudicial to the defense of these defendants. This shows how completely uncompatable the defenses were and should have cause for a severance to be granted."

During the progress of the trial the seating arrangement was discussed between counsel and the Court and complaint was made about it. There is no proof in the record about the seating arrangement of litigants and counsel.

The conduct of the trial and the seating arrangement of the parties and their counsel and the order of precedence are matters within the descretion and control of the trial judge and there is nothing to show that he did not take the best advantage of existing facilities to give all of the parties and their counsel fair treatment before the court and jury. There is no showing that any of the defendants were prejudiced by the seating arrangement.

The eleventh assignment of error is:

> "That the Court erred in not granting a mistrial when the State called Dean G. Smith as a State witness which could only be done by prior agreement with Dean G. Smith and his counsel. This shows an

agreement was reached even though both the prosecuting attorney and attorney for the defendant Dean G. Smith stated in open court that there were no deals or agreements. The defendants Gordon F. Ragland, and Oscar Clinton Prock relied on statements of counsel and were totally unprepared for such a turn of events."

We hold that the Attorney General had a right to call any witnesses he thought proper to call with the permission of the trial judge, just like the defendants had a right to call the witnesses they desired to call. That the defendant accomplice Smith was the only person who could make any valid objection to his being called as a witness, and he made none.

There is nothing to show that any agreement had been reached by and between the prosecuting attorney and the defendant Smith. This assignment is without merit.

By the twelfth assignment of error the defendants contend:

"That the Court erred in failing to grant a mistrial upon motion of defendant's Gordon F. Ragland and Oscar Clinton Prock when the Attorney General called them 'thieves' in his opening argument to the jury as such a statement is highly prejudicial and was very bad taste on the part of the District Attorney."

The bill of exceptions shows the following:

Mr. Tidwell (State's attorney): "What will be the ending if you or I were going to put a last chapter to this book about two thieves and three policemen? How would you end it? That, gentleman of the jury is for you to decide. That's for you to decide."

* * * * * * *

Mr. Patrick (Defense attorney): "If your Honor please, I may have overlooked it, but I think Mr.

Tidwell used the term thieves in identifying these people. Now, if your Honor please,"

Mr. Tidwell: "I was talking about a novel, Mr. Patrick."

Mr. Patrick: "Nobody in the courtroom has been found guilty yet."

Mr. Tidwell: "I will withdraw it."

The Attorney General withdrew the statement complained of when objection was made, the Court promptly directed the jury to forget it, and in his formal charge to the jury he specifically instructed the jury to not consider the statement.

If this was an unjustified characterization the matter was corrected by the Attorney General's withdrawing it and by the Courts' positive instruction to the jury.

We find this assignment without merit.

By the thirteenth assignment of error the defendants complain that:

"That the court erred in its charge when it charged presumption based on possession as it was not applicable to defendants in this case as no T.V. sets or radios were found in possession of defendants Gordon F. Ragland and Oscar Clinton Prock and the other two defendants James A. Wright and Gary Waddey were not charged with larceny and defendant Smith had plead guilty before the charge to the jury."

This assignment of error has no merit. The indictment contained counts charging larceny and receiving and concealing stolen property, as well as burglary in the third degree.

It was held in **State v. Veach,** 456 S.W. 2d 650 that:

"In order to sustain a conviction for concealing stolen property, besides proof of the theft and defendant's actual or constructive possession soon thereafter, it is

necessary to show that the defendant knew that the goods were stolen. **Kessler v. State** (1967), 220 Tenn. 82, 414 S.W. 2d 115. In deciding this issue the jury is entitled to look at all the evidence, circumstantial and otherwise, showing guilty knowledge, or the lack thereof, on the part of the defendant, and as enunciated in **Tackett v. State** (1969), Tenn., 443 S.W. 2d 450, an inference of guilty knowledge may arise from the unexplained possession of stolen property shortly after commission of the theft."

"And unless this exclusive possession of stolen property * * * is accounted for in a straightforward, truthful way, and unless the jury finds the explanation reasonable and satisfactory, the jury would be warranted in returning a verdict of guilty of receiving and concealing stolen property."

The fourteenth and fifteenth assignments of error are that:

"That the State failed to prove that the T.V. sets testified about by witness Pardue and Mosier were the same sets as listed in the indictment as they did not know the serial numbers nor did they have a receipt showing that they turned these sets over to police. These witnesses even testified on cross-examination that they did not know if these were the T.V. sets in the indictment."

"That based on the testimony stated in the above ground that due to the states failure to properly prove the above mentioned sets were part of the indictment, there was no other evidence to corroborate the testimony of Dean G. Smith against Gordon F. Ragland, therefore the verdict of the jury should not be allowed to stand.

These two assignments attack the sufficiency of the evidence and are found without merit for the reasons set out in our consideration of the first and second assignments of error.

The jury was satisfied with the identification of the goods and found the defendant's guilty of either grand larceny or receiving and concealing stolen goods as shown by their verdict. It is well to remember here that Ragland, Prock and Smith were found guilty of burglary in the third degree.

There was evidence that the defendants stole from National Stores Corporation a large number of television sets and radios, of the value of approximately eight thousand (8,000) dollars. The accomplice Dean G. Smith, whose testimony we find was adequately corroborated, testified the defendants Ragland and Prock broke and entered the store while he stood watch for them. That there were so many television sets stolen that it required several trips with the truck to remove them. That he, Smith, Ragland and Prock took them to the residence of the defendant Ragland and to the residence of defendant Wright.

The jury rejected the theory of the defendants and accredited the State's theory. We find the evidence does not preponderate against the verdict of the jury.

The assignments of error are overruled.

Though not pleaded and not made the basis of assignment of error, the fact that the defendants Ragland, Prock and Smith were each found guilty of more than one offense included in the indictment challenges our attention.

Gordon Ragland was found guilty of burglary in the third degree, grand larceny and receiving and concealing stolen property over the value of $100.00, and his sentences fixed at three years in the penitentiary for each offense.

Oscar Clinton Prock was found guilty of burglary in the third degree, and grand larceny and his sentences fixed at three years in the penitentiary for each offense.

Dean G. Smith was found guilty of burglary in the third degree, grand larceny and receiving and concealing stolen property over the value of $100.00. His sentences were fixed at three years in the penitentiary for each offense.

In the first count of the indictment these three defendants, Ragland, Prock and Smith were charged with burglary and grand larceny in the same count. In the second count of the indictment they were each also charged with receiving and concealing stolen property of the value of over $100.00.

We are of the opinion that these offenses were committed in a single continuing criminal act inspired by the same criminal intent which is essential to each offense, that only one punishment can be imposed. In the case of **White v. State**, 454 S.W. 2d 195, in an opinion by Judge Oris D. Hyder, decided November 26, 1969, certiorari denied April 20, 1970, where a defendant was convicted under one indictment charging in separate counts, murder in the second degree and robbery with a deadly weapon, this Court held:

> "In reviewing this record we conclude that the defendant cannot be convicted of both of the offenses: murder in the second degree and robbery by the use of a deadly weapon. While the assignments of error do not complain of the two convictions and two sentences, we are of the opinion that it is our duty to correct error and render such judgment on the record as the law demands, TCA 40-3409.
>
> We find that these offenses were committed at the same time and are part of a single continuing criminal act, inspired by the same criminal intent which

is essential to each offense, and that they are susceptible to but one punishment. **Patmore v. State,** 152 Tenn. 281, 277 S.W. 892. It is, then, in our opinion, the duty of this Court to determine the higher offense, or the higher grade of offense, and to allow the judgment and sentence for that offense to stand and strike the judgment and sentence for the lower or lesser offense."

While the punishment for burglary in the third degree and grand larceny and receiving and concealing stolen property over the value of $100.00 is the same, we hold that burglary in the third degree is the higher offense and that the jury having found the defendants guilty of burglary they should have fixed the punishment prescribed by the statute and should have disregarded the lesser offenses.

We affirm the judgments of guilty of burglary in the third degree against Ragland, Prock and Smith and sentences of not more than three nor less than three years in the penitentiary for each of them. The judgments against each of these defendants of guilty of grand larceny and sentences of three years in the penitentiary are reversed and dismissed. The judgments against Smith and Ragland of not less than three years nor more than three years in the penitentiary for receiving and concealing stolen property are reversed and dismissed.

The judgment against James A. Wright, Jr., for receiving and concealing stolen property over the value of $100.00 and a sentence of not more than seven years and not less than three years in the penitentiary, not to run concurrent with any former conviction is affirmed.

JOHN A. MITCHELL, Judge
s/ JOHN A. MITCHELL

Concur:

s/ WILLIAM S. RUSSELL
WILLIAM S. RUSSELL, Judge

APPENDIX C

In the Court of Criminal Appeals
of Tennessee, at Nashville

Gordon F. Ragland, Oscar Clinton Prock and James A. Wright, Jr., Plaintiffs-in-Error,

v.

State of Tennessee.

(Burglary and Receiving and Concealing Stolen Property)

Davidson County
Hon. John L. Draper, Judge

OPINION ON PETITION TO REHEAR

Plaintiffs-in-error have filed a petition to rehear.

We have carefully considered it, and find that it does not present any new question.

The petition to rehear is denied.

/s/ WILLIAM S. RUSSELL
Judge

Concur:

s/ JOHN A. MITCHELL
Judge

APPENDIX D

In the Court of Criminal Appeals, Nashville

Gordon F. Ragland, Oscar Clinton Prock and James A. Wright, Jr.
vs.
State of Tennessee.
No. 4956.
Davidson County.

Stay Order on Behalf of Gordon F. Ragland and James A. Wright, Jr.

ORDER

Upon motion of the plaintiffs in error, Gordon F. Ragland and James A. Wright, Jr., they are hereby granted a stay of execution of the judgment of this Court rendered on December 29, 1970, for a period of ninety days from May 3, 1971, pending the filing and disposition of a petition for the writ of certiorari to the Supreme Court of the United States, their petition for writ of certiorari to the Supreme Court of Tennessee having been denied on May 3, 1971; and during said time, the plaintiffs in error may remain at liberty upon their present bond.

The Clerk of this Court will issue a duly certified copy of this Order to the Clerk of the Criminal Court of Davidson County, the Sheriff of Davidson County, and to the Warden of the State Penitentiary.

Enter, this 5th day of May, 1971.

s/ JOHN A. MITCHELL
Judge

s/ ROBERT K. DWYER
Judge

s/ WILLIAM S. RUSSELL
Judge

Supreme Court, U.S.
FILED
OCT 9 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-455

GORDON F. RAGLAND and JAMES A. WRIGHT, JR.,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

DAVID M. PACK
Attorney General
State of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

THOMAS E. FOX
Deputy Attorney General
State of Tennessee
Supreme Court Building
Nashville, Tennessee 37219

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

INDEX

	Page
Jurisdiction	2
Questions presented	2
Statement of the evidence	2
Argument	4
I—Joint trials	4
II—Evidence of another offense	6
III—Illegal search	6
Conclusion	7

Cases Cited

Bruton v. U.S., 391 U.S. 123	5
Chambers v. Maroney, 399 U.S. 45	7
Giles v. Maryland, 386 U.S. 66	5
McMann v. Richards, 397 U.S. 759	7
Parker v. North Carolina, 397 U.S. 790	7
Roviaro v. U. S., 353 U.S. 53	5

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MAY IT PLEASE THE COURT:

The petitioners, Gordon F. Ragland and James A. Wright, Jr., were tried jointly. Ragland was convicted of burglary in the third degree, and Wright was convicted of receiving and concealing stolen property. Their convictions were affirmed by the Court of Criminal Appeals, State of Tennessee, in an unreported opinion announced on December 29, 1970, and attached to the petition as Appendix B. Petition for writ of certiorari was filed with the Supreme Court of Tennessee but denied. The order of denial is not included as an appendix but an order issued from the Court of Criminal Appeals attached to the petition as Appendix D recites that the petition for writ of certiorari with the Tennessee Supreme Court was denied on May 3, 1971.

JURISDICTION

Counsel for the respondent, State of Tennessee, does not challenge the jurisdiction of this Court to grant a writ of certiorari to the Court of Criminal Appeals for the State of Tennessee in the event it finds the circumstances warrant such action.

QUESTIONS PRESENTED

Ten questions have been presented by counsel for the petitioners, but counsel for the State is of the opinion that the substance of the ten questions can be more succinctly stated in three questions, as follows: (1) whether or not the petitioners' trial with each other and other defendants deprived them of due process of law because of the adverse interests of the several party-defendants, (2) whether or not evidence of another offense for which petitioner Wright had been convicted but pending on appeal being presented to the jury constituted a denial of due process, and (3) whether or not the admission of evidence obtained by means of an illegal search constituted a denial of petitioners' rights to due process under the Fourteenth Amendment, Federal Constitution.

Counsel for the State of Tennessee insists that these three questions should be resolved favorably to the State.

STATEMENT OF THE EVIDENCE

The National Stores Corporation in Green Hills was burglarized on the night of January 8, 1967. Approximately $8,500 worth of television sets were taken from the store. According to Dean G. Smith, a policeman who testified for the State, the burglary was performed by defendants Gordon F. Ragland and Oscar C. Prock while he stood watch for them in his police car and while in his police uniform.

A few days before the burglary, Dean G. Smith talked with his superior, James A. Wright, another policeman, regarding his (Dean G. Smith's) financial difficulties; and his superior, defendant Wright, arranged for the burglary. Several of the television sets were taken to defendant Wright's home. At least one of the television sets, serial No. 10BC54625, was sold by defendant Wright to Robert P. Russell, a State's witness, and later recovered by Sgt. Bowling of the Nashville Police Force.

Defendant Smith testified that defendant Prock's truck, a blue and white Chevrolet with a canope over it, was used in the burglary. Defendant Ragland testified as a witness in his own behalf. He corroborated the fact that defendant Prock had such a truck and that he and Prock had known each other all their lives. One other witness testified that Prock had such a truck and such a truck was seen with a police car following it by a service station operator. Defendant Ragland further testified that he knew nothing of the robbery and specifically denied selling a television set to one of the State's witnesses, Mr. Pardue, contrary to Mr. Pardue's testimony that he had sold a television to him that was one of the sets included in the indictment, Serial No. 77BF 7869.